IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 28 of 1997
WITH
CRIMINAL APPEAL No 29 of 1997
WITH
CRIMINAL APPEAL No 146 of 1997

For Approval and Signature:

HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE AKSHAY H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

GANPAT DALSUKH

Versus

STATE OF GUJARAT

Appearance:

MR DEEPAK M SHAH for Appellant No.
MR RC KODEKAR, APP for Respondent No. 1

CORAM : HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and

HON'BLE MR.JUSTICE AKSHAY H.MEHTA

Date of decision: 07/04/2005

ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE KSHITIJ R.VYAS)

1. The appellants in these three appeals are the original accused in Sessions Case No. 43 of 1995. They have challenged the judgment and order of conviction and sentence dated 12/12/1996 passed by the learned Additional Sessions Judge, Bharuch, convicting them for the offences punishable under sections 143, 147, 148, 149, 302, 452, 427 and 337 of the Indian Penal Code [IPC] and under section 135 of the Bombay Police Act [BP Act]. All the accused are sentenced to suffer rigorous imprisonment [RI] for life for the offences punishable under sections 143, 147, 148, 149 and 302 of the IPC and to pay fine of Rs.100/= each, in default to undergo simple imprisonment [SI] for one month. They are also convicted for the offences punishable under sections 452, 427 and 337 of the IPC and under section 135 of the BP Act and sentenced to suffer SI for three months. All the sentences are ordered to run concurrently.

2. The accused no. 1 - Ganpat Dalsukh Vasava filed Criminal Appeal No. 28 of 1997. Original accused no. 5 - Jagdish Natvarbhai Vasava filed Criminal Appeal No. 29 of 1997 and the original accused nos. 2, 3 and 4, namely Thakorbhai Vechanbhai Vasava, Ashokbhai Dalsukhbhai Vasava and Hathesing Motibhai Vasava filed Criminal Appeal No. 146 of 1997. It is stated at the bar that accused no. 2 - Thakorbhai Vechanbhai Vasava has expired during pendency of the appeal. Therefore, Criminal Appeal No. 146 of 1997 shall abate qua the said accused Thakorbhai Vasava.

2.1. All the accused have preferred these appeals through jail. They have been provided legal aid. Mr. Dipak M Shah, learned advocate has been appointed to represent them.

3. As per the prosecution case the incident happened on 9/5/1994 at about 18.0 hours at village Ninam of Taluka Amod of Bharuch district. It is the prosecution case that the complainant Narsinhbhai Motibhai Patel and deceased Gulabbhai Motibhai were sitting on the Ota adjacent to Ramji temple. At that time they saw Salim Sindhi, village watchman engaged to watch the crop in the fields, running towards his room, chased by all the accused with dangerous weapons like Dhariya, spear,

spade, Ada (cart wood) and stick. Salim hide himself in his room by closing the doors from inside. The accused made unsuccessful attempt to nab him. By the time they entered the room, Salim already fled away and, therefore, they started throwing stones on the temple damaging the clock of the temple and also damaged belongings of Salim. Thereafter, all the accused targeted Gulabbhai. It is the prosecution case that accused no. 1 - Ganpat gave Dhariya blow on the head of Gulabbhai. Accused no. 4 Hathesing inflicted blow with the handle of spear, likewise accused no. 5 - Jagdish also inflicted blow of blunt portion of spade, accused no. 2 Thakorbhai gave blow with Ada and accused no. 3 - Ashok inflicted stick blow to the deceased Gulabbhai. On hearing the shouts of complainant - Narsinhbhai, many persons gathered there and all the accused thereafter ran away with their weapons. Injured Gulabbhai was taken in a jeep to Government hospital at Amod. On the way to the hospital, they made an attempt to inform Amod Police Station about the incident. However, it was said that Police Sub Inspector had in fact gone to Ninam village. As the Doctor was on leave, the injured was removed to Government hospital at Jambusar, where he succumbed to the injuries. In the meantime P.S.I. Amod Police Station reached Jambusar. He recorded the complaint of Narsinhbhai. After registering the offence, usual investigation was carried out by the police and finally the charge-sheet was filed against all the accused before the Ld. Judicial Magistrate First Class, Amod, who in turn committed the case to the Sessions Court at Bharuch as the offences were exclusively triable by the Sessions Court.

4. The charge Exh. 18 was framed against the accused. All the accused pleaded not guilty and claimed to be tried. In their further statements recorded under section 313 of the Code of Criminal Procedure all the accused denied their involvement in the offence in question.

5. The learned trial Judge, after appreciating the evidence oral as well as documentary and the further statements of all the accused, has recorded the finding that all the accused formed unlawful assembly in prosecution of the common object, armed with the deadly weapons and in futherance of their common object, committed the murder of the deceased Gulabbhai. The learned trial Judge has also recorded the finding that all the accused also caused damage to the articles by throwing stones at the residence of Salimkhan. With these findings, the learned Judge passed judgment and

order of conviction and sentence as stated above. Hence, these appeals.

6. We have heard Mr. DM Shah, learned appointed advocate appearing for the appellants in all the appeals and Mr. RC Kodekar, Ld. APP appearing for the State at length. We have also minutely examined the evidence on record.

6.1. Learned advocate Mr. Shah submitted that the finding recorded by the learned trial Judge holding all the accused guilty for the offences under sections 143, 147, 148, 149 and 302 of the IPC, is illegal and erroneous in as much as there was no common intention of the accused to commit murder of Gulabbhai. He further submitted that all the accused chased Salim as they had some grievance against him and unlawful assembly was formed with a view to assault and/or to cause such bodily injury to him. On failure to nab Salim, merely because assault was made on Gulabbhai, all the accused cannot be convicted for the charge under sections 143, 147, 148, 149 and 302 of the IPC. It is further submitted by the learned advocate that the evidence of prosecution witnesses is inconsistent with the medical evidence and, therefore, the evidence is not believable and acceptable.

6.2. As against that, Mr. Kodekar, Ld. APP on the other hand, while supporting the reasons given by the learned trial Judge, submitted that all the accused formed unlawful assembly and cut short the life of deceased Gulabbhai for no fault of his. He, therefore, submitted that there is no substance in any of the appeals and prayed for their dismissal.

7. On going through the evidence of the prosecution witnesses, it appears that all the accused wanted to teach a lesson to Salim Sindhi as he had driven the cattle out from the field belonging to Meliben, the mother of accused no. 5 - Jagdish and also beaten her prior to the incident in question. It further appears that the said Salim Sindhi was appointed as village watchman by Gulabbhai, the deceased.

8. Narsinhbhai Motibhai, P.W. 1 Exh. 24, the complainant in his evidence gives details about the incident. According to him, on the day of the incident at about 6.00 p.m. he and deceased Gulabbhai were sitting on the Ota adjacent to temple, at that time they saw Salim running from the direction of the fields. He was chased by accused no. 1 with Dhariya, accused no. 4 with spear, accused no. 5 with spade, accused no. 2

with Ada and all were followed by accused no. 3 with stick. Salim took shelter in his room situated behind the temple. All the accused were excited and started assaulting Gulabbhai by stating that he is the leader of the village. According to the complainant, accused no. 4 inflicted Dhariya blow on the head of Gulabbhai with the result that he fell down bleeding profusely. Accused no. 4 also inflicted blow with spear, accused no. 5 gave blunt portion of the spade, accused no. 2 gave blow with Ada on Gulabbhai. Accused no. 3 who came later on, also gave a stick blow. The complainant shouted for help and on hearing the same, Ambalal Magan, Ramdas Asha, Dahyabhai Dadabhai, Rakesh Shankar, Raman Trikam, Ketan Pranjivan and Mulji Ranchhod all came from the place they were standing. All the assailants thereafter ran away. The injured was thereafter removed to Amod Government Hospital. Before reaching to the hospital, they waited at Amod Police Station. However, they were told that the P.S.I. had in fact gone to Ninam village. As the doctor was on leave, the injured was taken to Jambusar Government hospital, where he succumbed to the injuries. At Jambusar Hospital, Amod Police came and he gave a complaint to the P.S.I.

8.1. In his cross-examination he has admitted that though he has stated in the complaint that deceased was his maternal uncle, he is not his real uncle. He has denied the suggestion that a mob of many persons came to beat Salim. According to him, incident of beating Gulabbhai lasted only for 2 to 4 minutes. According to him, the first blow of Dhariya was given on the front portion of the head. He has also stated that he is not in a position to give details about other accused inflicted blows on which part of the body of the deceased. According to him, Gulabbhai was unconscious when they waited at Amod Police Station and he did not talk with him or with anybody. He has denied the suggestion that on seeing the mob, with a view to escape, deceased fell down from the Ota and sustained injuries when he came in contact with the outer portion of the Ota.

8.2. Ambalal Maganbhai Patel P.W. 2 Exh. 25 has also seen the incident. According to him, the incident had taken place on the Ota of Dahyabhai Ashabhai, adjacent to Ramji temple. His house is situated just opposite to the said Ota which is at a distance of 25 paces. On hearing hubbub, he came out from his house and went towards the place of incident, at that time he saw the accused belonging to Vasava community going towards the house of Salim. In the crowd he saw accused no. 1, accused no. 4, accused no. 5, accused no. 2 and accused no. 3 with

the weapons like Dhariya, spear, spade, Ada and stick. He saw accused breaking belongings of Salim. As the Salim was not there in the house, they came towards temple side where they damaged the watch of the temple. According to him, all the accused gave blows to the deceased with the weapons held by them. He had witnessed the incident from the distance of 5 ft. When he was asked as to what did complainant and this witness do, he replied by saying that the complainant tried to save the deceased. However, he did not do anything and stood there. Nothing substantial has been brought out from his cross-examination. In reply to the Court's question, he has stated that the utensils, tape and radio were broken by the assailants. He has also admitted that he was not in a position to give details as to which accused carried which weapon and who caused injuries to Gulabbhai. According to him, out of the crowd of 25 persons, he only identified five accused.

8.3. Rikeshbhai Shankarbhai Patel P.W. 3 Exh. 26 who also witnessed the incident, in his evidence, has stated that even though he is serving in I.T.I. at Sarbhan, he almost every day comes to his village Ninam for the purpose of looking after his agricultural work. His duty hours are morning to noon. On the day of the incident he returned to village Ninam at 4.00 p.m. His house is situated at a distance of 250 ft. from the temple. On hearing hubbub at 6.00 p.m., he had gone to Ramji temple where he saw accused with the weapons in their hands going to the room of Salim Sindhi. They broke open the door and tried to damage the utensils of Salim. As they did not find Salim inside the room, they returned to the temple and started throwing stones. In the result the clock of the temple was broken. Thereafter, he has given the same version as narrated by the other prosecution witnesses. Except giving blows with the weapons by the accused, he has not given any details about which accused carried which weapons and which accused caused injuries to the deceased. He has also not given any details regarding the numbers of blows given by the accused with the weapons held by them.

8.4. Dinesh Babulal Pujari P.W. 5 Exh. 30 is the priest of the temple. According to him, the incident had taken place between 6.00 and 6.30 in the evening. At that time he was in the temple. He has given details about the accused and the weapons carried by them. All the five persons had attacked the house of Salim Sindhi and had broken the chain of the door and destroyed his utensils. Since all the accused thereafter attacked the temple by throwing stones thinking that Salim might have

hidden himself there, the wall clock of the temple was broken. Thereafter, they came to the front portion of the temple and saw complainant and deceased sitting there. According to him, accused no.1 gave Dhariya blow on the front portion of head of Gulabbhai, while other four accused had given blows with the weapons held by them. He saw the incident from the distance of 4 ft. In his cross-examination he has stated that deceased Gulabbhai was the trustee of the temple and was solely looking after the administration of the temple.

8.5. Salim Sindhi P.W. 12 Exh. 44 has in his evidence stated that 3 to 4 years prior to the incident he used to watch the fields and crop, which was part of his duty as village watchman. He came to know that some cattles were grazing in the fields and he thereafter rushed to the field and drove out the cattle from the field. While he was returning to the village with the cattle, on the outskirts of the village he had altercations with all the five accused with a view to save himself from the possible attack, he had run inside his house. According to him, before he had gone to his house, he was beaten by all the accused on his hand as well as head. When the accused tried to break the door, after breaking open his window, he escaped and hidden himself in the temple where he remained upto 9.00 p.m. Thereafter, he had gone to village Sarbhan and on the next day in the morning he had gone to Amod Police Station where the police recorded his statement. According to him, the appointment of village watchman is made by the committee consisting of Vallabhbhai, the Sarpanch, Rakeshbhai, Pramodbhai and Gulab Moti (the deceased).

9. On going through the above evidence, it is clear that except complainant Narsinhbhai, no other prosecution witnesses have given details about the part played by the accused. In other words, except complainant, the other eye witnesses have given a general statement that the accused inflicted blows with the weapons held by them. Nothing is stated about part on which the blows were given. Even the evidence of the complainant though more specific than other witnesses, is not convincing. He has stated that accused no. 4 gave Dhariya blow on the head of the deceased, with the result deceased fell down bleeding profusely. At that time accused no.4 gave blow with handle portion of spear and accused no. 5 gave blow with blunt portion of the spade. If the accused were keen to finish deceased Gulabbhai, accused no. 4 could not have used the handle portion of the spear. Likewise accused no. 5 could not have inflicted blunt portion of

the spade. Normally if a person uses spear, he would use the sharp edged and pointed portion. Likewise when a spade is used, normally the sharp portion of the blade of the spade is used. Therefore, the assertion on the part of PW 1 - the complainant regarding the use of the handle portion of the spear as well as the blunt portion of the spade appears to be unnatural and, therefore, not acceptable. PW 2 Ambalal though gave details about the weapons held by the accused, he, in his evidence made a general statement that accused used their weapons for inflicting blows, he has not given any other details regarding number of blows given by particular accused and on which portion the blows were inflicted. P W 3 - Rikesh has also not given any details about the blows given by the accused. He also made a general statement that Vasavas have given blows with the weapons held by them. P.W. 5 Dineshbhai in his evidence has also given the same version. He involves only accused no. 1 who has given Dhariya blow on the head of the deceased while other four accused have given the blows to the deceased. When all these witnesses saw the incident within a radius of 10 to 15 ft. it is expected from them to give the clear and unambiguous version regarding the role played by each accused. All the accused are known to the prosecution witnesses as they belonged to the same village. The incident happened at 6.00 p.m. in the month of May. Therefore, there is full visibility. Inspite of this, except P.W. 1 and P.W. 5 to some extent, any other witnesses have not given any particulars regarding the weapons, blows given by particular accused. Even if we accept the evidence of the prosecution witnesses in toto, in that event there would be atleast five injuries on the person of the deceased. Surprisingly, doctor who performed the post mortem has found three injuries, viz. two incised wounds and one CLW on the skull over parietal bone. They are as under:-

i. Incised wound on the scalp over both parietal bone, oblique in direction, extending to left parietal bone to Rt parietal bone, crossing the junction of the both parietal bone of size 3" x 1/2" x bone depth.

ii. Incised wound on the scalp over left parietal bone near parallel to the junction of both parietal bone of size 4" x 1/2" x bone depth.

iii. C.L.W. of the scalp over occipital bone of size 1.1/2" x 1/2" x bone depth near the junction of both parietal bone and occipital bone.

9.1. Dr. Chiranjivilal Dhanaram Kataria P.W. 4 Exh. 28, at the relevant time serving as Medical Officer at

Primary Health Centre, Jambusar, stated in his evidence that he performed post mortem of Gulabbhai Motibhai on 9/5/1994 at 8.15 hours in the morning and completed at 9.45 hours and found the aforesaid injuries. He also noticed depressed fracture of left parietal bone at the junction of both parietal and occipital bone. According to Dr. Kataria, all the injuries were ante-mortem. The injury nos. 1 and 2 were possible with Dhariya, while injury no. 3 was possible with stick or Ada and/or hard and blunt substance. He has also stated that all the three injuries were caused with the respective weapons by separate blows using different force. According to him, injury nos. 1 and 2 are possible with Dhariya, while injury nos. 1 and 2 are also possible with sharp edged portion of the spade. In his opinion, the cause of death was shock leading to intracranial haemorrhage due to fracture of the skull bone. Thus, the medical evidence is clear as far as the injuries sustained by the deceased and the use of the weapons are concerned. As stated above, there were three injuries on the head, two were incised wounds possible with the use of Dhariya while one being C.L.W. possible with hard and blunt substance like stick or Ada. P.W. 1 Narsinhbhai has clearly stated that accused no. 5 - Jagdish used the blunt portion of the spade. Therefore, use of spade in causing the incised wound is also ruled out. Likewise, the use of spear by accused no. 4 is also ruled out in absence of any punctured wound. It is not possible for us to accept the say of P.W. 1 Narsinhbhai that the handle portion of the spear was used by accused no. 4, which, in our opinion, is improbable and unnatural. In view of the fact that the deceased sustained two incised wounds which are possible with the use of Dhariya, all the prosecution witnesses are consistent as far as involvement of accused no. 1 in the incident is concerned. Under the circumstances, we have no hesitation to hold that accused no. 1 - Ganpat is mainly responsible in causing two separate injuries by using Dhariya on the head of the deceased, which is a vital part of the body. In absence of any other injuries found on the person of the deceased which is possible by the use of spear and/or spade, we are of the view that accused no. 4 and accused no. 5 can be given benefit of doubt provided we disbelieve the prosecution case of unlawful assembly formed by all the accused. With the same reasoning we may also give the benefit of doubt to accused no. 2 who used Ada as well as accused no. 3 who used stick. Even the doctor noticed C.L.W. on the head of the deceased. Since there is only one C.L.W., in absence of specific evidence it has not come on record as to which accused caused the said injury to the deceased.

9.2. As stated above, while fixing individual liability, the Court has to record a finding that all the accused have formed the unlawful assembly while committing the act in furtherance of their common object. As far as the first part of the incident is concerned, namely, the accused chasing Salim Sindhi with the dangerous weapons in their hands, we are fully convinced that at that time all the accused were prosecuting common object to cause bodily injury to Salim Khan. In furtherance of the same, all the accused formed unlawful assembly carrying dangerous weapons with them and chased the said person. However, when they failed to trace him out, their mind diverted to some other act, they started throwing stones at the residence of Salim and the temple causing damage to the wall clock and other utensils. At that time, they saw Gulabbhai sitting with the complainant Narsinhbhai, who according to them, was responsible to appoint Salim as village watchman. It is the prosecution case that all the accused thereafter gave blows to Gulabbhai by using the weapons held by them. From the above discussion, it clearly transpires that it was accused no. 1 alone, who caused injuries by using Dhariya held by him. If the prosecution case is accepted, in that event there would be more than five injuries. Since there is only one C.L.W. injury, it is not possible for us to involve any other accused in causing the same in absence of any direct evidence in that behalf. The prosecution witnesses who have witnessed the incident at a very short distance, have failed to give any details about the role played by each accused.

9.3. In view of the evidence which is quite general and vague in nature, it is not possible for us to convict all the accused by holding them guilty for the offences punishable under sections 143, 147, 148 and 149 of the IPC. Under the circumstances, we have to hold that all the accused did form an unlawful assembly, upto the stage when they chased Salim Sindhi and caused damages to his utensils. Thereafter, in absence of any positive evidence, it is not possible for us to convict all the accused with the aid of sections 143, 147, 148 and 149 of the IPC. In absence of any positive evidence involving all the accused in the offence under section 302 with the aid of sections 143, 147, 148 and 149 of the IPC, all the accused can be dealt with their individual role.

9.4. From the aforesaid discussion, in our opinion it would be too hazardous to convict all the accused under

section 302 of the IPC by holding that they formed unlawful assembly with a view to commit murder of Gulabbhai Motibhai. From the evidence on record and as observed above, it is accused no. 1 alone who is responsible for causing serious injuries by giving two blows of Dhariya on the head of the deceased, which is a vital part. Therefore, we hold that the prosecution has established the charge under section 302 of the IPC against accused no. 1 only. As far as other accused are concerned, in absence of sufficient evidence regarding their individual role, we acquit each of them for the offences punishable under section 302 read with sections 143, 147, 148 and 149 of the IPC.

10. In view of the ocular evidence on record corroborated by medical evidence, it is not necessary for us to consider the evidence regarding recovery of the weapons as well as the FSL reports about blood stains on the weapons used by the accused. Suffice it to say that even in the FSL report no blood stains on the weapons have been noticed.

11. In the result, we pass the following order :-

i. Criminal Appeal No. 28 of 1997 filed by accused no. 1 - Ganpatbhai Dalsukhbhai Vasava is partly allowed. The judgment and order of conviction and sentence passed by the learned trial Judge convicting him for the offences punishable under sections 143, 147, 148, 149 and 302 of the IPC are altered as under :

The said appellant is convicted for the offence under section 302 of the IPC and is ordered to suffer RI for life and fine of Rs.100/=, in default SI for one month. He is acquitted of offences under sections 143, 147, 148 and 149 of the IPC.

As far as his conviction and sentence under sections 452, 427 and 337 of the IPC and under section 135 of the BP Act passed by the trial Court are confirmed.

As the appellant Ganpat Vasava is released on bail at the time of admission of his appeal, we hereby direct that his bail bonds shall stand cancelled. The concerned police is directed to arrest the accused forthwith to undergo the sentence imposed.

ii. Criminal Appeal no. 29 of 1997 filed by accused no. 5 - Jagdish Natvarbhai vasava is partly allowed. The judgment and order of conviction and sentence passed by the learned trial Judge for the offences punishable under sections 143, 147, 148, 149 and 302 of the IPC are

set aside. We, however, maintain the order of conviction and sentence passed against him for the offences under sections 452, 427 and 337 of the IPC and u/S. 135 of the BP Act. The set off for the period of imprisonment undergone as an under-trial prisoner and after his conviction will be given to him.

The appellant - Jagdish Vasava is released on bail by this Court at the time of admission of the appeal. We, therefore, cancel his bail bonds.

iii. Criminal Appeal no. 146 of 1997 is partly allowed. It abates as far as accused no. 2 - Thakorbhai Vechanbhai Vasava is concerned and it is dismissed qua accused no. 2. The judgment and order of conviction and sentence passed by the learned trial Judge convicting the accused no. 3 - Ashokbhai Dalsukhbhai Vasava and accused no. 4 - Hathesing Motibhai Vasava for the offences punishable under sections 143, 147, 148, 149 and 302 of the IPC are set aside. We, however, confirm the order of conviction and sentence passed against them for the offences under sections 452, 427 and 337 of the IPC and u/S. 135 of the BP Act. The set off for the period of imprisonment as under-trial prisoners and after their conviction will be given to them.

Since we set aside the judgment and order of conviction and sentence for the substantive offence under section 302 of the IPC, they should be released on their completion of sentence with respect to offences stated above, if not required for any other offence. Order accordingly.

Muddamal articles to be disposed of in terms of the direction contained in the judgment of the trial Court.

[KSHITIJ R. VYAS, J.]

[AKSHAY H. MEHTA, J.]

* Pansala.